No. 94-2107

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In the Supreme Court of the United States

OCTOBER TERM, 1995

COMMONWEALTH OF VIRGINIA, ET AL.,
CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE CROSS-RESPONDENT

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44 pp

QUESTION PRESENTED

Whether the exclusion of women from the Virginia Military Institute, based solely on their sex, violates the Equal Protection Clause of the Fourteenth Amendment.

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Martin Binkin & Shirley J. Bach, *Women and the Military* (1977) 19

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Traci Johnson Mathena, *Best Western: As It Celebrates Its Vaunted Past, the City's All-Girls High School Prepares for a Future That Will Keep It at the Head of the Class*, Balt. Sun, Oct. 30, 1994, at 8 (Magazine) 26-27

Ann Firor Scott, *The Southern Lady: From Pedestal to Politics, 1830-1930* (1970) 19

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OPINIONS BELOW

The opinion of the court of appeals regarding liability (*VMI I*) (Pet. App. 134a-157a),[1] is reported at 976 F.2d 890. The opinion of the district court regarding liability (Pet. App. 158a-245a) is reported at 766 F. Supp. 1407. The opinion of the court of appeals regarding remedy (*VMI II*) (Pet. App. 1a-52a) is reported at 44 F.3d 1229. The opinion of the district court regarding remedy (Pet. App. 53a-131a) is reported at 852 F. Supp. 471.

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[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in *United States* v. *Commonwealth of Virginia*, No. 94-1941 (filed May 26, 1995).

JURISDICTION

The judgment of the court of appeals regarding liability (*VMI I*) was entered on October 5, 1992. A petition for rehearing was denied on November 19, 1992. Pet. App. 157a. A petition for a writ of certiorari was denied on May 24, 1993. Pet. App. 132a-133a. The district court on remand approved a remedy. The United States appealed to challenge the remedy as inadequate, and cross-petitioners cross-appealed to challenge the original finding of liability. The judgment of the court of appeals regarding remedy (*VMI II*) was entered on January 26, 1995. The court of appeals voted sua sponte not to rehear the case en banc, and entered an order to that effect on April 28, 1995 (Pet. App. 246a-257a). On April 18, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 26, 1995. The United States filed a petition for a writ of certiorari on May 26, 1995 (No. 94-1941). The cross-petitioners filed a conditional cross-petition for a writ of certiorari on June 23, 1995. This Court granted the petition and cross-petition on October 5, 1995. 116 S. Ct. 281. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This brief addresses cross-petitioners' challenge (No. 94-2107) to the court of appeals' *VMI I* decision regarding liability, in which that court held that the

sex-based exclusion of women students from the Virginia Military Institute (VMI) violates the Equal Protection Clause of the Fourteenth Amendment. We earlier filed a brief in support of our challenge (No. 94-1941) to the court of appeals' *VMI II* decision approving as a remedy for that violation the establishment of a new, separate college program that would exclude men. The procedural and factual background of the case is set forth in the Statement in our brief in No. 94-1941, at 2-15. That Statement is supplemented below with a further description of the liability holdings.

1. The proceedings in the district court were bifurcated. After a trial regarding liability, the district court on June 14, 1991, entered judgment in favor of cross-petitioners, holding that VMI's exclusion of women did not violate the Equal Protection Clause. Pet. App. 158a-245a. The district court recognized and found that "[t]he system of education at VMI is not offered elsewhere in the United States," *id.* at 192a,[2] and that women therefore "are denied a unique educational opportunity that is available only at VMI," *id.* at 218a.[3]

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[2] The district court acknowledged that the Virginia Polytechnic Institute and State University (VPI), although it has a coeducational residential program offering military-style training, is a "dramatically different institution[]" offering "dramatically different experiences" from those offered at VMI. Pet. App. 192a.

[3] Women also have no opportunity to compete for the VMI State Cadetships, a group of state-funded college scholarships that the Commonwealth of Virginia awards exclusively to men who attend VMI. The Commonwealth awarded $147,104 in VMI-designated scholarship funds to 35 male VMI cadets in 1990-1991. Pet. App. 189a.

The court held, however, that VMI's exclusion of women met the constitutional test for sex-based classifications set forth in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982). See Pet. App. 164a-165a. Under that test, VMI's policy is unconstitutional unless cross-petitioners can show that that exclusion "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." 458 U.S. at 724 (internal quotation marks omitted).

During the proceedings regarding liability, the Commonwealth of Virginia denied that VMI's discriminatory policy fostered *any* state objectives.[4] Counsel for the VMI Foundation, Inc., and the VMI Alumni Association, private organizations that intervened as defendants, represented VMI, its superintendent and its Board of Visitors at trial. Those defendants asserted two "governmental" objectives allegedly supporting VMI's discriminatory exclusion of women: "educating cadets for lives as 'citizen-soldiers,'" and fostering "system-wide diversity by providing an opportunity for single-sex education and by providing a distinctive program of military-style

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[4] The Governor stated in his Answer that "no person should be denied admittance to a state supported school because of his or her gender." Pet. App. 142a (L. 7-8). The Virginia Attorney General concluded that the "positions of the Governor and the Commonwealth" were "inseparable." *VMI I* C.A. App. 134 (L. 25); see Pet. App. 142a. Because neither the Governor of Virginia nor the Commonwealth defended VMI's sex-based exclusionary policy at the trial on liability, *id.* at 142a, 160a, the Commonwealth obtained a stay of the proceedings against it on the condition that it would be bound by any liability determination, *id.* at 160a.

education." R. 152 (VMI Defendants' Proposed Findings of Fact and Conclusions of Law (liability phase) (Apr. 26, 1991)), at 114 (¶ 28), 115 (¶ 38).

The district court determined that system-wide "diversity in education" is a "legitimate objective" for a State to pursue, Pet. App. 167a; see *id.* at 159a, and that, because "some students, both male and female, benefit from attending a single-sex college," single-sex education is a constitutionally legitimate form of diversity within an educational system, *id.* at 168a. It also concluded that "VMI's unique method of instruction" contributes to diversity in Virginia's educational offerings. *Id.* at 176a.[5]

The district court next determined that VMI's exclusion of women was substantially related to the achievement of diversity in Virginia's higher education system, because "[VMI's] single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women." Pet. App. 173a. The court noted that "[t]he sole way to attain single-gender diversity is to maintain a policy of admitting only one gender to an institution," *id.* at 167a, and that, "even though some women are capable of all the individual activities required of VMI cadets, a college where women are present would be significantly different from one where only men are present," *id.* at 170a.[6] The court acknowledged

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[5] The district court did not address the asserted interest in educating cadets for lives as citizen-soldiers.

[6] The court found that VMI would have to adopt less stringent physical education requirements for women, even though the court credited "[e]xpert testimony establish[ing] that * * * some women are capable of all of the individual activities

that the successful assimilation of women at West Point shows that, "[w]ithout a doubt, VMI could do likewise." *Id.* at 172a n.8. But "[t]he VMI Board has decided that providing a distinctive, single-sex educational opportunity is more important than providing an education equally available to all." *Id.* at 170a. The court concluded that VMI's desire to avoid the changes that admitting women would bring "provide[s] sufficient constitutional justification for continuing the single-sex policy." *Id.* at 172a.

2. The court of appeals vacated and remanded, holding that VMI's admissions policy violated the Equal Protection Clause. Pet. App. 134a-156a (*VMI I*). The court held that neither prong of the *Hogan* test was satisfied.[7] The Commonwealth of Virginia, the court noted, "failed to articulate an important objective which supports the provision of [VMI's]

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required of VMI cadets." Pet. App. 170a-171a, 233a-235a. The court also found that VMI would have to alter its facilities to allow men and women privacy from the other sex during activities such as undressing and showering, *id.* at 171a, 233a, and that the presence of women would add "a new set of stresses on the cadets," *id.* at 171a.

[7] As a preliminary matter, the court determined that "single-sex education is pedagogically justifiable" for "[b]oth men *and* women" and that "VMI's male-only policy is justified by its institutional mission." Pet. App. 150a-151a. But those conclusions did not answer the question "whether the unique benefit offered by VMI's type of education can be denied to women by the state under a policy of diversity, which has been advanced as the justification and which was relied on by the district court." *Id.* at 151a. The court emphasized that, by "commenting on the potential benefits of single-gender education," the court "d[id] not mean to suggest the specific remedial course that the Commonwealth should or must follow." *Id.* at 155a-156a.

unique educational opportunity to men only." *Id.* at 137a; see *id.* at 155a. The court rejected the district court's attribution to Virginia of the objective of providing single-sex education to promote a diverse array of educational options. *Id.* at 152a-153a.[8] It found that Virginia lacked any "stated policy justifying single-sex education in state-supported colleges and universities"; Virginia's only policy statement "with respect to gender distinctions" in higher education required that its colleges and universities treat students "*without regard to sex, race, or ethnic origin*," *id.* at 153a (emphasis added by court of appeals).[9] The court noted that Virginia has in fact abandoned public single-sex education at every institution of higher education other than VMI. *Id.* at 154a.[10]

The court of appeals also found no substantial relationship between an interest in diversity and the categorical exclusion of women from VMI: Even "[i]f VMI's male-only admissions policy is in furtherance of a state policy of 'diversity,' the explanation of how the policy is furthered by affording a unique educa-

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[8] Cross-petitioners did not assert on appeal, and the court did not consider, the interest in training students for lives as citizen-soldiers.

[9] Moreover, "[t]he lack of a state-announced policy to justify gender classifications is aggravated by the reluctance of the Commonwealth, as a party, and its governor to participate in this case and in this appeal." Pet. App. 153a. Indeed, as the Commonwealth's policy was articulated by the governor, "VMI's single-sex admissions policy *violates* state policy." *Ibid.* (emphasis added).

[10] Several of Virginia's public colleges had previously been single-sex, but "[a]ll Virginia statutes requiring individual institutions to admit only men or women have been repealed." Pet. App. 188a.

tional benefit only to males is lacking. A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender." Pet. App. 153a-154a.

Cross-petitioners sought review in this Court, which denied certiorari. *VMI* v. *United States*, 113 S. Ct. 2431 (1993) (Pet. App. 132a-133a).[11] After the court of appeals affirmed the decision approving VMI's proposed remedy, the Court granted the United States' petition challenging the remedy and also granted the conditional cross-petition challenging the liability holding. *United States* v. *Commonwealth of Virginia*, 116 S. Ct. 281 (1995).

SUMMARY OF ARGUMENT

The court of appeals applied established equal protection principles to hold that the Virginia Military Institute unconstitutionally excludes women based on their sex. That holding is constitutionally unassailable. The Commonwealth of Virginia reserves VMI for men, and thus provides no opportunity for women to enjoy its benefits. The Commonwealth offers nothing to meet the needs of women who are, but for their sex, qualified for VMI and want to attend. A formal state policy that offers an educational opportunity to men that is not offered to women is presumptively unconstitutional.

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[11] On remand, the district court approved a remedial plan that continues to exclude women from VMI and establishes an all-female Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College, a private, liberal arts college primarily for women. Pet. App. 53a-131a. The court of appeals affirmed. *Id.* at 1a-52a (*VMI II*). We have addressed that remedial plan in the Brief for the United States in No. 94-1941.

That presumption is especially strong where, as here, the policy not only denies women a valued opportunity, but in doing so relies on and reinforces harmful and archaic sex-role stereotypes. VMI's rigorous, military-style education is renowned, and the Institute's alumni network is an extraordinarily powerful one, especially in historically male-dominated fields. In defending its exclusionary policy, VMI has relied on archaic notions that men are more confident and aggressive than women and has concluded that men alone would therefore want and benefit from VMI's military-style educational method. VMI's exclusion of women echoes and reinforces historical patterns of discrimination and stereotyping that, for most of our history, closed to women the most rigorous educational opportunities and excluded them from leadership roles in business and public life.

Such formal sex-based barriers, and the stereotypes that support them, have no place under our modern Constitution. This Court's equal protection cases squarely reject governmental reliance on the kinds of psychological and sociological generalizations about women and men that cross-petitioners assert. Although the United States believes that strict scrutiny is the correct standard of constitutional review for official discrimination based on sex, the unconstitutionality of VMI's exclusionary admissions policy is evident under intermediate scrutiny as well. Indeed, this Court's decision in *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982), alone compels affirmance of the liability determination in this case. Just as Mississippi could not constitutionally reserve a public nursing school for women based on "a stereotyped view of nursing as an ex-

clusively women's job," so, too, is Virginia's reservation for men of a stereotypically male form of military-style leadership training constitutionally forbidden.

Cross-petitioners have failed to show that VMI's exclusionary admissions policy is necessary to serve any important governmental objective. This Court's cases require that the policy be evaluated with reference to the State's actual goals in employing it. The actual objective of excluding women from VMI when that policy was initiated at the founding of the school in 1839 reflected the assumptions of that time—assumptions that men alone were fit for military and leadership roles. Before this litigation was initiated, Virginia never sought to supply a valid, contemporary rationale for VMI's exclusionary policy. That failure itself renders the VMI policy invalid.

In any event, no current rationale justifies continuing to exclude women from VMI. The only objective cross-petitioners have asserted, post-hoc, is an interest in enhancing the "diversity" of options in Virginia's system of public higher education. As the court of appeals correctly observed, however, Virginia does not in fact have any policy of enhancing diversity by providing single-sex, military-style education. And the court of appeals correctly concluded that, in any event, a policy of diversity in higher education is patently inadequate to justify providing men, but not women, an enhanced diversity of choices.

Cross-petitioners' assertion that a State must be able to provide single-sex education to one sex alone amounts to a contention that single-sex education is constitutional *per se*. This Court in *Hogan* rejected

that view, and instead required an exceedingly persuasive justification in each instance in which a State excludes persons from an educational opportunity based on their sex. Although it is possible that single-sex education for only one sex may be constitutionally justifiable in order to compensate for discrimination that only one sex has suffered, no such rationale is present here. And, contrary to cross-petitioners' contention, the fact that private colleges in Virginia offer single-sex education to women provides no excuse for VMI's policy of excluding women. No other school in Virginia, public or private, provides to women the opportunity they are denied at VMI, and private schools cannot, in any event, alleviate the Commonwealth's constitutional obligation to treat the sexes equally.

VMI need not exclude women in order to continue to offer "a distinctive program of military-style education." It is undisputed that some women can perform all the tasks required at VMI and would thrive under VMI's military-style methodology. Although minor changes in physical training and privacy accommodations would accompany the admission of women, the Commonwealth has no interest in avoiding such changes, and certainly none strong enough to justify the continued exclusion of women. VMI could continue effectively to fulfill its stated mission of educating citizen-soldiers if both qualified men and women were admitted as students.

ARGUMENT

I. VMI'S ADMISSIONS POLICY IS UNCONSTITUTIONAL BECAUSE IT EXCLUDES QUALIFIED WOMEN FROM A UNIQUE EDUCATIONAL OPPORTUNITY SOLELY BECAUSE OF THEIR SEX

A. The unconstitutionality of VMI's policy is clear

The Virginia Military Institute (VMI), a state college,[12] has an admissions policy that bars all women as students solely on account of their sex. The policy excludes women without regard to their actual qualifications. No woman is permitted to experience VMI's unique, military-style educational program, or take advantage of VMI's enormous prestige and alumni network. Cross-petitioners ask this Court to hold that the Equal Protection Clause permits a State to offer a unique and prestigious educational program at a 150-year-old institution of higher education only to men, without offering *any* alternative whatsoever to women.

In our opening brief in No. 94-1941, we argue that the only way to achieve equal protection here is to admit women to VMI, and that the Virginia Women's Institute for Leadership (VWIL) is a patently inadequate and unconstitutional alternative. Cross-petitioners have argued in that case that VWIL

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[12] VMI is one of 15 state institutions of higher education in Virginia. Pet. App. 138a. It is "financially supported by the Commonwealth of Virginia and remains 'subject to the control of the [Virginia] General Assembly.' Va. Code Ann. § 23.92. It is governed by a Board of Visitors, which the Commonwealth expressly charges with prescribing 'the terms upon which cadets may be admitted, their number, the course of their instruction, the nature of their service, and the duration thereof.' Va. Code Ann. § 23-104." *Ibid.*

provides an adequate remedy to women for the unconstitutionality of VMI's admissions policy. Here they make the much more extreme contention that they can continue to operate VMI for men only, without offering any alternative whatever to women. No conceivable theory of equal protection can sustain that proposition.

1. *VMI's policy substantially harms women*

The practical consequences for women of VMI's exclusionary policy are pernicious. The policy deprives women who seek to attend VMI of valued educational benefits—benefits that cross-petitioners themselves have repeatedly characterized as "unique." VMI is a small college offering a rigorous, military-style educational program. It has been successful in "instilling physical and mental discipline, character, and a kind of moral code." Pet. App. 204a. The barracks-centered military program at VMI is unavailable elsewhere in Virginia. See 94-1941 U.S. Br. 2-5, 16, 22.

VMI's policy also excludes women from life-long opportunities, responsibilities, and powerful connections that VMI has long afforded its graduates. VMI's alumni network is "enormously influential," 94-1667 & 94-1717 (*VMI II*) Tr. 1227, especially in the male-dominated fields of engineering, the military, business, and public service, in which VMI graduates most often tend to pursue careers, *id.* at 1228. This case, like the parallel case against the similar exclusionary policy of The Citadel in South Carolina, therefore concerns not only education, but also "wealth, power, and the ability of those who have it now to determine who will have it later." *Faulkner* v. *Jones*, 51 F.3d

440, 451 (Hall, J., concurring), motion to stay mandate denied, 66 F.3d 661 (4th Cir.), cert. dismissed, 116 S. Ct. 331, cert. denied, 116 S. Ct. 352 (1995). See 94-1941 U.S. Br. 2-3, 16, 22-23.

The sex-based distinction at issue in this case is particularly harmful to women because of its reliance on sexual stereotypes. Rejection of sex-stereotyping lies at the core of the equal protection concern with classifications based on sex. VMI's exclusion of women from the Commonwealth of Virginia's military-style leadership educational program communicates the message that, in the Commonwealth's official view, rigorous, military-style training is not appropriate for women. That impermissible state policy is vividly highlighted by cross-petitioners' defense of the exclusion of women in this case, which rests in large part on archaic and overbroad notions about men's and women's personalities and preferences, including the view that men are more confident, aggressive, and suited to hierarchy than women, and that women are more emotional, caring, and interested in marrying than men. See 94-1941 U.S. Br. 37-42.[13] In this context, cross-petitioners' suggestion (Br. 26) that "single-sex education performs

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[13] To invalidate VMI's exclusion of women because it is based on overbroad stereotypes is not to denigrate individuals for whom such stereotypes are accurate, but rather to reject the premise that, merely because stereotypes are true for some individuals, the State has a right to apply them to everyone. Reliance on stereotypes is harmful because it forecloses individual opportunity for persons who do not fit the traditional mold. Such reliance impedes accurate, current assessment of the needs and abilities of individual members of both sexes. See 94-1941 U.S. Br. 40-44 (discussing case law prohibiting reliance on overbroad sex-based generalizations and stereotypes).

a valuable service in uprooting inaccurate stereotypes" is bewildering.

2. *Established law compels invalidation of VMI's policy*

No modern sex discrimination case has upheld a policy of excluding one sex from an educational institution to the advantage of the other.[14] Nor have any of this Court's modern cases accepted sociological or psychological generalizations about men and women as rendering the sexes not similarly situated for equal protection purposes.[15] The Court has found women to be differently situated in the equal protection context only because of biological sex differences,[16] un-

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[14] See *United States* v. *Hinds County School Bd.*, 560 F.2d 619 (5th Cir. 1977) (invalidating system of separate single-sex public high schools); *Garrett* v. *Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991) (granting preliminary injunction against males-only public elementary schools); *Kirstein* v. *Rector and Visitors of Univ. of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) (requiring women's admission to University of Virginia); *Newberg* v. *Board of Pub. Educ.*, 478 A.2d 1352 (Pa. Super. Ct. 1984) (requiring girls' admission to Philadelphia's boys-only Central High School); but see *Vorchheimer* v. *School Dist.*, 532 F.2d 880, 881-882, 886 (3d Cir. 1976) (upholding Central High School's exclusionary admissions policy in litigation in federal court in which plaintiff "d[id] not allege a deprivation of an education equal to that which the school board makes available to boys"), aff'd by an equally divided Court, 430 U.S. 703 (1977).

[15] Indeed, this Court in *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 (1994), invalidated sex-based preemptory challenges based on the sociological generalization that women "hold particular views simply because of their gender."

[16] In approving a statutory rape law that applied differently to men and women, this Court expressly disavowed relying,

challenged legal disabilities,[17] or for compensatory reasons.[18] Cross-petitioners ask this Court to rely, for the first time, on sociological and psychological stereotypes to restrict educational opportunity for women. That position is contrary to the established meaning of equal protection, and should be rejected.

As we argued in our opening brief in No. 94-1941, at 33-36, we believe that strict scrutiny is the correct constitutional standard for evaluating classifications that deny opportunities to individuals based on their sex. Because this Court has not previously applied

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as the lower court did here, on males' greater aggressiveness, and instead relied on the anatomical fact that "females can become pregnant as a result of sexual intercourse; males cannot." *Michael M.* v. *Superior Court of Sonoma County*, 450 U.S. 464, 473, 475, 476 (1981) (opinion of Rehnquist, J.) ("the statute does not rest on the assumption that males are generally the aggressors"); but cf. *International Union, United Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991) (holding that a sex-based policy of excluding women with childbearing capacity from lead-exposed job constitutes sex discrimination under Title VII).

[17] See *Rostker* v. *Goldberg*, 453 U.S. 57, 78 (1981) (upholding draft registration for men and not for women because unchallenged combat restrictions on all women made men and women "simply not similarly situated for purposes of a draft or registration for a draft").

[18] In *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), for example, the Court upheld a federal statute that afforded women Navy officers longer than men to gain promotion or face mandatory discharge, not because of any notion that women's personalities or sociological role make them achieve promotions more slowly, but because legal restrictions on all women in combat and sea duty—which were not challenged—made women and men "*not* similarly situated with respect to opportunities for professional services." *Id.* at 508.

strict scrutiny to sex-based classifications, however, we argued below, and show here, that cross-petitioners have not established that VMI's exclusionary policy satisfies intermediate scrutiny. Indeed, VMI's exclusion of women fails even meaningful rational-basis review. See *Kirstein* v. *Rector and Visitors of Univ. of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) (requiring admission of women to the University of Virginia).

Under intermediate scrutiny, "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982); see also *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994). That burden is met "only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Hogan*, 458 U.S. at 724, quoting *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980). Cross-petitioners fail to meet both parts of that burden.

Cross-petitioners' liability is evident from a straightforward application of *Hogan*. Just as this Court's "searching analysis" in *Hogan* revealed that the State lacked any actual compensatory objective for excluding men from a state educational program, 458 U.S. at 728-730 & n.16, the objectives proffered here for the exclusion of women are not actual, non-discriminatory reasons for the challenged policy. Like the single-sex admissions policy in *Hogan*, which rested on the "stereotyped view of nursing as an

exclusively woman's job," *id.* at 729, cross-petitioners' justifications reflect archaic stereotypes, and reinforce the view that men alone are fit for leadership and military careers. And just as the exclusion of men from the Mississippi University for Women (MUW) was not necessary to Mississippi's educational goals, *id.* at 731, VMI's men-only admissions policy is not necessary to serve any valid educational goals asserted here.

B. Cross-Petitioners Have Not Established That The Actual Reasons For Excluding Women From VMI Are Legitimate

A sex-based classification must be evaluated with reference to the *actual* reason the State has chosen to employ it. *Hogan*, 458 U.S. at 730 & n.16. Courts "need not in equal protection cases accept at face value assertions of [state] purposes, when an examination of the [challenged sex-based classification] and its history demonstrates that the asserted purpose could not have been a goal" of the classification. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). Yet, despite cross-petitioners' burden to justify VMI's policy in terms of the actual reasons it was adopted, they have not sought to identify and rely on those reasons.

VMI adopted its men-only admissions policy at its founding in 1839, and it has never changed that policy. See Dianne Avery, *Institutional Myths, Historical Narratives, and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. Cal. Rev. L. & Women's Stud. (forthcoming Spring 1996), manuscript at 59-92 (regarding VMI early history) (lodged with the Court and served on opposing counsel). In 1839, prevailing

social norms presumed that men alone were capable of military or leadership training. See, *e.g.*, Pet. App. 41a-43a (Phillips, J., dissenting); Ann Firor Scott, *The Southern Lady: From Pedestal to Politics, 1830-1930*, at 68 (1970) (referring to severely restricted educational opportunities for women in the antebellum South). Even by the end of the nineteenth century, few women had access to any public higher education at all, and that education was focused on practical, "feminine" skills such as typing, drawing, cooking, needlework and housekeeping. See, *e.g.*, *Hogan*, 458 U.S. at 720 n.1 (regarding MUW, founded in 1884); *Williams* v. *McNair*, 316 F. Supp. 134, 136 n.3 (D.S.C. 1970) (regarding Winthrop College for girls, founded in 1891), aff'd mem., 401 U.S. 951 (1971). Rigorous public higher education was reserved for men, see, *e.g.*, *Kirstein*, *supra*, as was service in the military, see, *e.g.*, Martin Binkin & Shirley J. Bach, *Women and the Military* 4-6 (1977).

The original grounds for VMI's admissions policy, founded on officially unquestioned and harmfully constraining assumptions about men's and women's proper roles, are patently illegitimate today. Before this litigation was instituted, neither VMI nor the Commonwealth identified or acted upon any other basis for continuing to exclude women from VMI's student body.[19] To affirm the court of appeals' lia-

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[19] In the 1980s VMI conducted a Mission Study of its exclusionary admissions policy in the wake of this Court's decision in *Hogan*, *supra*. Pet. App. 208a. The Mission Study failed to supply *any* current, constitutional rationale for continuing to exclude women from VMI. The Committee's final report rejected admission of women, but "[t]he Report pro-

bility holding, this Court need go no further than to recognize the current constitutional invalidity of the reasons for which VMI initially adopted its discriminatory admissions policy.

C. Cross-Petitioners' Post-Hoc Rationalizations Also Do Not Justify Excluding Women From VMI

Cross-petitioners have not sought to defend VMI's admissions policy in terms of the actual reasons for which it was adopted. They have, instead, proffered a post-hoc objective. They now assert (Br. 28) that women must be excluded from VMI to serve the Commonwealth's interest in "offering a diversity of choices in higher education." [20] As cross-petitioners describe it, the diversity interest has two components: (1) enhancement of diversity by offering single-sex education within a system that is otherwise coeducational, and (2) enhancement of diversity by providing a distinctive style of military education. The court of appeals considered and correctly rejected that post-hoc "diversity" objective. This Court should do the same.

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vided very little indication of how this conclusion was reached." *Id.* at 212a; see generally L. 103-109, 110-117 (Mission Study Committee data); L. 195-199 (Final Report of Mission Study Committee). The report stated in a conclusory fashion that admission of women would "alter the mission" of VMI, and that, "[g]iven the experience of the U.S. Service Academies," demand among women from VMI would be inadequate. L. 196.

[20] Cross-petitioners do not assert here the second objective upon which they relied in the district court: an interest in producing citizen-soldiers. See pages 4, 5 n.5, 7 n.8, *supra*.

1. *Virginia has no state policy of advancing diversity in higher education through the provision of single-sex, military-style education*

Cross-petitioners have failed to demonstrate that either of the two components of system-wide diversity that they identify—enhancing diversity by providing single-sex education and a distinctive military-style educational method—are actually aspects of the Commonwealth of Virginia's interest in diversity in its higher education system. The court of appeals correctly held that Virginia lacks any state policy of advancing diversity in its system of higher education through the provision of single-sex education. Pet. App. 151a-154a; see also 94-1941 U.S. Br. 46-47.[21]

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[21] State policy requires each institution of higher education to deal with students without regard to sex. Pet. App. 153a. The Governor of Virginia thus stated in his Answer in this case that "no person should be denied admittance to a State supported school because of his or her gender." L. 7. The absence of a state policy in favor of single-sex education in higher education is borne out by the fact that all state statutes that formerly required single-sex admissions policies at certain institutions of higher education have been repealed, and none of Virginia's public colleges, other than VMI, is single-sex. More women than men in Virginia are enrolled in private single-sex institutions of higher education in Virginia, Pet. App. 189a, and the district court thus concluded that demand for single-sex public higher education is "greater among women than among men," *id.* at 190a. This suggests that, if the Commonwealth actually had a policy of offering single-sex education as an aspect of system-wide diversity in higher education, it would have offered such single-sex education to women. In light of those facts, cross-petitioners' contention (Br. 30) that the absence of single-sex public higher education for women in Virginia for almost a quarter of a century is the result of "an historical anomaly" in the application of an

Cross-petitioners appear to acknowledge (Br. 31) that Virginia does, in fact, lack any such policy at the state level.[22] Instead, they argue (Br. 31-32) that, because the Commonwealth delegates the authority for setting admissions policies to each individual state institution of higher education, VMI's own "decision to pursue the benefits of single-sex education and the VMI method" is a state purpose.

The Commonwealth of Virginia's delegation of admissions-policy authority to VMI, however, undermines, rather than supports, cross-petitioners' position. If single-sex, military-style education is offered by the Commonwealth for its educational benefits for some students, the state educational system must include both men's *and women's* military-style single-sex options (and presumably a coeducational option as well). No single institution of higher education has the capability to provide more than one of those options. Delegation to individual institutions thus cannot be a rational means of implementing a nondiscriminatory state policy of enhancing educational diversity by providing single-sex, military-style education. As the court of appeals correctly concluded, "if responsibility for implementing diversity has

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otherwise consistent policy favoring single-sex education is wholly implausible.

[22] Cross-petitioners' only suggestion to the contrary relies on the fact that, during the remedial stage of this case, state officials, including the Governor, made statements supporting the remedial plan to offer women a public single-sex leadership program at Mary Baldwin College. Cross-Pet. Br. 31 n.15; see L. 289-296. Those statements were made after the Commonwealth's liability had already been determined, and are thus irrelevant to a review of the court of appeals' liability determination.

somehow been delegated to an individual institution, no explanation is apparent as to how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." Pet. App. 154a.[23]

2. *Virginia cannot enhance the diversity of choices in higher education for men alone*

The basic flaw in cross-petitioners' diversity rationale is that it completely fails to justify offering a diversity of choices to men but not to women. A State may not maintain a sex-based classification merely by showing that it confers a benefit on the favored sex; it must also justify benefitting that sex alone. The Court in *Hogan* rejected dissenting Justice Powell's suggestion that a public nursing school's

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[23] Whether a subdivision of a State can assert the State's objective in support of a challenged classification depends in each instance on the subdivision's authority and the nature of the objective. For example, in *Regents of Univ. of California* v. *Bakke*, 438 U.S. 265 (1978), Justice Powell concluded that an interest in diversity within the student body of any single institution was the kind of interest that a single institution was competent to assert. *Id.* at 311-312 (opinion of Powell, J.). And the opinions in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986), upon which cross-petitioners also rely (Br. 32), determined only that a city or school district may take steps to remedy its own discrimination, not, as cross-petitioners assert here, that those entities could assert interests beyond their own ability to effectuate. See *Croson*, 488 U.S. at 491 (opinion of O'Connor, J.) ("a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction"); *Wygant*, 476 U.S. at 277 (opinion of Powell, J.) (a public employer may adopt remedial affirmative action if it has "a strong basis in evidence" for doing so).

exclusion of men could be justified by the State's interest in providing to women the additional educational option of attending a single-sex nursing school. The Court observed that reliance on the value of a benefit provided to one class "begs the question" of "whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal." 458 U.S. at 731 n.17; see also *Wengler*, 446 U.S. at 151. If the rule were otherwise, virtually all discriminatory classifications would be self-justifying. A State could, for example, designate its only engineering or medical school for men or its only school of education or art for women. In each of those cases, the favored class, like the men who attend VMI, would have a more diverse range of educational options from which to choose than they would in the absence of the single-sex school.

The Commonwealth's interest in fostering system-wide diversity of educational choices can therefore be a legitimate, nondiscriminatory rationale only insofar as the Commonwealth offers diversity for both men *and* women equally. As the court of appeals correctly held, "[i]f VMI's male-only admissions policy is in furtherance of a state policy of 'diversity,' the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking." Pet. App. 153a-154a. The addition of a men-only VMI to the educational options otherwise available in Virginia to both men and women cannot be substantially related to a *nondiscriminatory* interest in diversity.

Cross-petitioners contend (Br. 38) that a State that offers a single-sex, military-style education to en-

hance diversity need not offer such education to both sexes, and they point to *Hogan* for support. The interest asserted by the State in *Hogan*, however, was not diversity, but compensation for discrimination against women. 458 U.S. at 727. Offering a single-sex educational option exclusively to one sex alone can, perhaps, be justified on compensatory grounds. Unlike an interest in enhancing diversity, an interest in compensating one sex for discrimination is not undermined by the absence of an equal opportunity for the other sex. The goal of providing compensation for prior or present discrimination against one sex is necessarily served by providing benefits only to the disadvantaged group. Because the plaintiffs in *Hogan* argued (albeit unsuccessfully) that MUW excluded men in order to compensate women for discrimination, the Court did not view "the absence of any state-provided single-sex educational opportunity for the excluded gender [as] *itself* sufficient to render the challenged admissions policy unconstitutional." Cross-Pet. Br. 38. The absence of an opportunity for women is, however, dispositive in this case, where no compensatory rationale is present.[24]

To the extent that cross-petitioners assert that VMI itself has an interest in providing the pedagogical benefits of single-sex education to men only, VMI's

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[24] To the extent that cross-petitioners mean to suggest that VMI serves a compensatory rationale (Br. 46) ("VMI's males-only admissions policy serves to roughly equalize overall single-sex educational opportunities in Virginia for men and women" (internal quotation marks omitted)), they have their history backward. It is women, not men, who have experienced discrimination in higher education in Virginia. See, *e.g.*, *Kirstein*, 309 F. Supp. at 187.

admissions policy certainly serves that interest. Their argument (Br. 36-42) that single-sex education may constitutionally be provided to men alone, however, is simply a contention that single-sex education, *whether or not provided equally* to women and men, is constitutional *per se*. Under cross-petitioners' analysis, it would be a matter of constitutional indifference whether a State or school district offered some or all of its education through single-sex institutions, even if all or almost all the single-sex institutions were for men only. This Court considered and rejected that argument in *Hogan*.

Hogan contemplated that single-sex education might be permissible where its benefits for particular populations serve legitimate, important governmental objectives that cannot be served by sex-neutral alternatives. But the exclusion of one sex from an educational institution reserved for the other is clearly not a valid end in itself. A decision invalidating VMI's men-only admissions policy will not, contrary to cross-petitioners' suggestion (Br. 41-42), invalidate single-sex public education in all circumstances; it will, however, properly invalidate it where, as here, it is not justified by an important, nondiscriminatory state interest.[25] A decision upholding VMI's policy

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[25] As a practical matter, single-sex public education in the United States is extremely rare. There are only three public colleges in the United States that have sex-based admissions policies: VMI and The Citadel, both of which are men-only military schools, and the women-only Douglass College, in New Brunswick, New Jersey, on the Rutgers University campus. Pet. App. 189a-190a. At the high school level, there appear to be only two public single-sex schools: Girls High School in Philadelphia, and Western High School in Baltimore, both exclusively for girls. See Traci Johnson Mathena,

would, on the other hand, sweep away any meaningful constitutional scrutiny of programs that exclude persons based on sex.

Cross-petitioners contend (Br. 45) that the exclusion of women from VMI must be evaluated in the context "of the range of educational opportunities and public financial assistance afforded to women in Virginia's higher education system," including four private women's colleges in Virginia and one private men's college. They suggest (Br. 46) that VMI "helps fill a gap created by the private sector's failure to provide greater or more attractive single-sex opportunities for male college students." But, as the

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Best Western: As It Celebrates Its Vaunted Past, the City's All-Girls High School Prepares for a Future That Will Keep It at the Head of the Class, Balt. Sun, Oct. 30, 1994, at 8 (Magazine). We are unaware of any single-sex public elementary schools. With respect to single-sex classes in coeducational schools, Title IX (the federal statute that bars sex discrimination by educational institutions that receive federal funds) prohibits the provision of courses separately on the basis of sex, except in certain limited circumstances. See 20 U.S.C. 1681; 34 C.F.R. 106.34(c) (certain physical education classes), (e) (classes dealing exclusively with human sexuality); 34 C.F.R. 106.3 (permitting sex-based remedial action).

In citing examples of circumstances in which it believes public single-sex education may be beneficial, VMI refers (Br. 41) to a Virginia statute as "authorizing local school boards to offer single-sex classes in the Commonwealth's public schools." The statute, however, expressly notes that its authorization is limited to circumstances in which offering such classes would be "[c]onsistent with constitutional principles." 1995 Va. Acts ch. 582 (to be codified at Va. Code Ann. § 22.1-212.1:1 (Michie Supp. 1995)). To the extent that Virginia's public schools receive federal funds, Title IX's limitations would also apply.

court of appeals correctly noted, "[n]o other school in Virginia or in the United States, *public or private*," offers to women what they are denied at VMI. Pet. App. 151a (emphasis added).[26] In any event, the existence of private women's colleges in Virginia has no bearing on the Commonwealth's constitutional obligation to treat men and women equally within its own system of public higher education. The Constitution requires that *the State* treat all persons equally.

3. *VMI need not exclude women in order to offer "a distinctive program of military-style education"*

a. Cross-petitioners assert (Br. 27) that "VMI's methodology has proven to be particularly beneficial to the adolescent male students it attracts." But it is undisputed that some women can do everything that is required of cadets at VMI, Pet. App. 170a, and that "some women will thrive in the adversative environment," *id.* at 172a. There is therefore no valid justification for providing VMI's military-style education to men and not to women.

If VMI admitted women, the diversity of educational options in Virginia's system of public higher education would remain enhanced by the VMI program, but that diversity interest would be served in a legitimate, nondiscriminatory manner. The lower

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[26] A State may of course design its public education system with an eye to the offerings already available in the private sector, and thus, for example, set up a medical school but not a law school to complement a private system that includes a law school but not a medical school. But the permissibility of viewing public and private resources as a whole for such sex-neutral purposes, see, *e.g.*, Pet. App. 191a, cannot detract from the State's obligation to treat men and women equally in its own institutions.

courts recognized that VMI is strikingly different from every other college in Virginia for a multitude of reasons beyond its exclusion of women.[27] Cross-petitioners' claim (Br. 34) that admission of women would eliminate the "very aspects of [VMI's] program that distinguish it from * * * other institutions of higher education in Virginia" is thus simply incorrect.

Although admission of women to VMI would require some changes at that institution, those changes also do not justify excluding women. The only changes that the court of appeals anticipated would

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[27] VMI's suggestion (Br. 9-10, 36) that Virginia Polytechnic Institute and State University (VPI) is a coeducational equivalent to VMI was correctly rejected by the district court and the court of appeals. Indeed, cross-petitioners themselves previously repudiated that position. See, *e.g.*, R. 152 (VMI Defendants' Proposed Findings of Fact and Conclusions of Law (liability phase) (Apr. 26, 1991)), at 97 (¶ 536). The court of appeals in its liability opinion concluded that VPI is not similar to VMI. Pet. App. 151a n.8. The district court, too, concluded that "VMI and the military barracks at [VPI] are dramatically different institutions that offer dramatically different experiences," *id.* at 192a, and that "[t]he differences between VPI and VMI's educational experiences outweigh the similarities, independent of gender," *id.* at 218a. VPI maintains only a 394-person residential corps of cadets within a larger, non-military-oriented student body of 18,000. *Id.* at 214. Thus, a coeducational VMI "would remain the only small college campus in Virginia offering a military program." *Id.* at 173a-174a; see also *id.* at 218a. The district court also contrasted the operation of the respective corps: "VMI emphasizes uniformity, hierarchy, and the adversative method. VPI recognizes individual differences and is more informal." *Ibid.* And, most importantly, VPI's corps of cadets lacks the traditions, prestige and alumni ties that VMI enjoys. *Id.* at 192a.

result from admitting women to VMI are changes in "physical training, the absence of privacy, and the adversative approach." Pet. App. 147a-148a. Cross-petitioners have failed to identify any state interest whatsoever in preserving those particular attributes of VMI's method in exactly their current form—and they certainly have not identified any such interest sufficiently important to justify excluding women from VMI.

Admission of women would not require VMI to change materially the distinctive, military-style educational benefits it currently affords. See 94-1941 U.S. Br. 28-33.[28] As we argued in our opening brief, accommodations necessary to preserve privacy or account for physical differences would be minimal, and would not adversely affect the ability of VMI to continue to fulfill its mission of producing "citizen-soldiers" through its military-style program. The court of appeals' concern that the "decency that still permeates the relationship between the sexes" (Pet. App. 23a) would suffer if the "adversative" method

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[28] VMI asserts (Br. 34, 36) that it is "[t]he simple truth * * * that 'VMI's mission can be accomplished only in a single-gender environment,'" and that "that factual issue was resolved against the Government by both courts below." The United States does not contest that some limited changes, such as separate toilets, would be needed. The dispute focuses, rather, on the legal conclusions to be drawn regarding such changes—specifically, whether the admission of women would change VMI in a manner material to any actual state interest of the Commonwealth, and whether the refusal to make those changes is constitutional in light of the fact that the result of that refusal is the exclusion of women from a unique educational program. These are purely legal issues subject to *de novo* review.

were conducted in a coeducational environment is constitutionally invalid; women who are qualified to attend VMI and who want to go there cannot be excluded in the name of advancing archaic notions of appropriate interaction between women and men.[29] Moreover, the benefits to men of attending VMI would probably be enhanced, rather than diminished, if women were admitted. Leadership and military careers in today's society require men and women to interact in a mature, respectful and professional manner with members of the other sex. See, *e.g.*, Pet. App. 241a-242a (district court finding that, upon the admission of women, "[i]f anything, the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army").

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[29] Cross-petitioners' assertion (Br. 35) that, if women were present, "the strict egalitarianism that pervades all aspects of the program[] would undergo radical change or disappear altogether" is absurd. Egalitarianism would be advanced, not hindered, by admitting qualified women to VMI, just as egalitarianism was advanced when African American students were first admitted to VMI in 1968. No one suggests that "tensions" that are "incompatible with VMI's educational method" (*ibid.*) arise because VMI has special programs devoted to "Retention of Black Cadets," Pet. App. 229a-230a, providing them with academic assistance, *VMI I* C.A. App. 1435, and fostering "[s]ocial-cultural support and black student morale within a dominantly white institution," *id.* at 1438. See also 94-1941 U.S. Br. 29 (recounting existing differences in treatment of male cadets). The notion that egalitarianism *suffers* when women and men are together, because minor accommodations need to be made, is inconsistent with the most fundamental meaning of the Equal Protection Clause.

b. Cross-petitioners contend (Br. 43-45) that VMI may continue to exclude women in the absence of any alternative because of an asserted lack of demand among women for a VMI-type education. There is no factual basis for that argument, and it is also contrary to established law because based on stereotyped views of women's preferences and abilities.[30] The district court thus correctly viewed the level of demand as irrelevant as a matter of law. Pet. App. 174a. It found, in addition, that "VMI would be able to achieve at least 10% female enrollment" and that "[t]his would be a sufficient 'critical mass' to provide the female cadets with a positive educational experience." *Id.* at 232a.[31]

Cross-petitioners do not disagree with that factual determination. Instead, they allege a lack of demand for a separate, women-only "VMI." Even if that factual allegation were supported (which it is not), a low level of demand for a separate opportunity—even one, like a school, that requires investment of substantial resources—cannot justify otherwise unconstitutional discrimination. Thus, at a time when separate-

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[30] VMI's failure to raise this argument in the lower courts also waived it.

[31] See also Pet. App. 231a (crediting cross-petitioners' expert witness testimony that "successful recruitment of women would likely yield VMI a cadet corps of approximately 10% women, or 130 women"); *id.* at 174a ("some women, at least, would want to attend [VMI] if they had the opportunity"). VMI engages in "extensive recruiting activities" to attract men and makes no effort to recruit women, *id.* at 228a, yet "[d]uring the two years preceding the filing of this action, * * * [VMI] receive[d] over 300 inquiries from women," *id.* at 141a; see also *id.* at 229a (district court finding); see, *e.g.*, L. 156.

but-equal racial segregation was constitutionally permissible, the Court held that a black person could not be denied admission to the State's only (all-white) law school on the ground that not enough blacks were interested in law to justify the State's establishment of a black law school. *Missouri. ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). The equal protection right of the black law school applicant was "a personal one," and he was entitled to be furnished an educational program equal to that provided to whites "whether or not other negroes also sought the same opportunity." *Id.* at 351. And as early as 1914 the Court held that the failure to offer black travelers luxury railroad accommodations could not be justified on the ground that the carrier wished to segregate the races and too few black travelers could afford luxury accommodations to justify their provision for blacks. *McCabe* v. *Atchison, T. & S.F. Ry.*, 235 U.S. 151. Cross-petitioners have failed to cite a single case to support their demand-based defense, and we know of none.[32]

As a factual matter, cross-petitioners failed to show that there is an actual lack of demand for a separate, women's VMI. The only evidence cited regarding allegedly low levels of presumed demand for a women's VMI was offered in the *remedial* proceedings, in an effort to justify VWIL's substantial differences from VMI. That evidence is avowedly completely speculative and not based on empirically re-

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[32] But see *Faulkner* v. *Jones*, 51 F.3d at 445 (emphasis omitted) (speculating, in absence of evidence of lack of demand, whether established rule that "demand is not relevant to an equal protection analysis" might differ when the State confers not a "civil right" but an "economic benefit").

liable surveys or other reliable methodology,[33] and was, in all events, introduced too late to be relevant to the already completed liability proceeding.

It would, moreover, be impossible suddenly to create a new institution for women only that would be equal to VMI. See 94-1941 U.S. Br. 20-25. Given the inevitable deficiencies in facilities, faculty, prestige, traditions and alumni connections of a new, separate "women's VMI," it thus would not be at all surprising if some women who are interested in attending VMI itself would not want to attend such a new, separate institution. The impossibility of quickly duplicating for women an established and successful men-only college is a reason that qualified women must be admitted to the existing institution, not a justification for continuing to exclude them. See *Sweatt* v. *Painter*, 339 U.S. 629 (1950) (requiring admission of black plaintiff to whites-only law school due to absence of constitutionally adequate separate alternative for blacks); *Faulkner* v. *Jones*, 51 F.3d 440, 450 (requiring admission of woman plaintiff to men-only military college if the State failed to provide a constitutionally adequate single-sex alternative for women), motion to stay mandate denied, 66 F.3d 661 (4th Cir.), application for stay of enforcement denied, No. A-127 (Aug. 11, 1995).

Demand is also a product of the historical availability of opportunities. The fact that Virginia has

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[33] One of the experts whose testimony cross-petitioners cite merely extrapolated from his own conclusions about women's personalities to conclude that there would be little demand for a women's VMI. Pet. App. 73a-74a. A second expert arrived at the same conclusion by referring to demand among women for West Point and VPI, *id.* at 75a n.12, both of which in fact successfully appeal to ample numbers of women.

never offered—and still does not offer—a VMI education to women thus undoubtedly plays a large role in the apparent level of women's interest in such an institution.[34] Sex-based official policies that restrict opportunity based on stereotypes are harmful precisely because they reinforce restrictive roles for men and women. When the roles deemed appropriate for men and women are thus restricted, individuals' sense of possibility is artificially curtailed. Arguments based on "demand" are accordingly especially suspect in this setting.[35]

II. THE LEGALITY OF PRIVATE SINGLE-SEX EDUCATION WOULD BE UNAFFECTED BY A HOLDING THAT VMI'S ADMISSIONS POLICY IS UNCONSTITUTIONAL

Contrary to cross-petitioners' suggestion (Br. 41), the unconstitutionality of VMI's men-only admissions policy, like the unconstitutionality of the MUW women-only admissions policy invalidated in *Hogan*, does not affect the continued legality of private single-

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[34] Cf. *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977) (under Title VII, the actual applicant pool for a particular position may be artificially depressed "since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory"); *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 365-367 (1977).

[35] It is noteworthy, for example, in light of the 1972 enactment of Title IX, that, from 1971 to 1978, girls' participation in organized high school sports rose by over 600% (notwithstanding a 5% decrease in overall enrollment of girls in high school during that period). See 44 Fed. Reg. 71,419 (1979). Women's participation in college intramural and intercollegiate sports rose by over 100% during the same period. *Ibid.*

sex education. Private entities are not state actors under the United States Constitution; thus a ruling that VMI cannot constitutionally continue to exclude women would not, for example, require private, men's institutions such as Hampton-Sydney and Morehouse Colleges, or private, women's institutions such as Randolph-Macon and Spelman Colleges, to admit members of the other sex.[36]

Because the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful," *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948), such a ruling also will not prevent governments from providing financial assistance to private educational institutions, including single-sex institutions, pursuant to nondiscriminatory governmental assistance programs.[37] The provision of even substantial public assistance has been held not to convert an otherwise private entity into a governmental actor. See 94-1941 U.S. Br. 45 n.31. In *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 843 (1982), for example, the Court held that, even where public

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[36] With certain specified exceptions, private educational institutions that receive federal financial assistance may maintain single-sex admissions policies without violating the nondiscrimination requirements of Title IX, 20 U.S.C. 1681(a). But see 20 U.S.C. 1681(a)(1) (excepting private "institutions of vocational education, professional education, and graduate higher education"). Under federal law, private schools may not, however, refuse admission to qualified individuals based on race—a prohibition that applies without regard to receipt of federal funds. See 42 U.S.C. 1981; *Runyon* v. *McCrary*, 427 U.S. 160 (1976). Section 1981 is inapplicable to sex discrimination.

[37] That would be true whether intermediate or strict scrutiny applies.

funds accounted for virtually all of a private school's operating budget, the school was not subject to constitutional constraints. A State is held constitutionally liable for a private institution's policies "only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains"; such responsibility exists only where the State has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Id.* at 1004-1005.

Cross-petitioners err in contending (Br. 41-42) that this Court's decision in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), is to the contrary. *Norwood* held that a State that was under a federal desegregation order, and that therefore had an affirmative constitutional duty to dismantle its segregated system of education, could not provide aid to all-white private schools founded in order to avoid public school desegregation. *Id.* at 467-468. Providing public assistance to private institutions that admit only members of certain groups has not been held to violate equal protection when that aid is part of a nondiscriminatory government program serving legitimate governmental objectives. See, *e.g.*, *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 176 (1972) (State's grant of valuable liquor license to private club does not render State liable for club's policy of racial exclusion).

CONCLUSION

The judgment of the court of appeals on liability should be affirmed.

Respectfully submitted.

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